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No. 04-6

Supreme Court, U.S.
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In The Supreme Court of the United States

DENNY'S INCORPORATED, IN ITS FIDUCIARY CAPACITY AS PLAN ADMINISTRATOR; DENNY'S INCORPORATED VACATION PAY PLAN; ANDREW F. GREEN, IN HIS CAPACITY AS TRUSTEE OF THE DENNY'S INCORPORATED EMPLOYEE BENEFITS TRUST; DENNY'S INCORPORATED EMPLOYEE BENEFITS TRUST,

Petitioners,

v.

CHUCK CAKE, IN HIS CAPACITY AS ACTING DIRECTOR OF THE CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS; ARTHUR LUJAN, IN HIS CAPACITY AS THE LABOR COMMISSIONER OF THE STATE OF CALIFORNIA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

1. Whether the Fourth Circuit correctly held (in conformity with the Second, Fifth and Sixth Circuits) that the Anti-Injunction Act ("AIA") barred the district court from enjoining Respondents' state court action when the district court had not issued an injunction prior to the filing of the state court action, where this holding can be supported on the alternative ground (in conformity with the First, Seventh and Eighth Circuits) that Petitioners failed to file a motion for injunctive relief prior to the filing of the state court action.

2. Whether the Fourth Circuit correctly held (in conformity with the Third and Fifth Circuits) that the Employee Retirement Income Security Act of 1974 ("ERISA") is not an "expressly authorized" exception to the AIA, where this holding can be supported on the alternative ground (in conformity with the Sixth Circuit) that under the facts of this case, Petitioners' ERISA action does not fall within this exception as the prosecution of the pending state action does not violate ERISA, and Petitioners can litigate their preemption defense in the state proceeding.

3. Whether the Fourth Circuit correctly held that the AIA barred Petitioners' claims for declaratory relief because otherwise the AIA would be reduced to a minor technicality.

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STATEMENT OF THE CASE

Denny's, a nationwide restaurant chain with its principal place of business in South Carolina, maintains the Denny's, Inc. Vacation Plan ("the Plan") and the Denny's, Inc. Employee Benefits Trust ("the Trust") for the stated purpose of providing vacation benefits to eligible employees. The Plan provides for a forfeiture of accrued vacation wages upon termination of employment unless the terminating employee has completed six months (for salaried employees) or one year (for hourly employees) of continuous service. Appendix to Petition at 2a.

The California Labor Commissioner is responsible for the investigation and adjudication of wage claims brought by employees against California employers. The Labor Commissioner also has statutory authority to file lawsuits against California employers for violations of California wage and hour laws. Appendix at 3.

On July 11, 2002, Denny's received a letter from an attorney at the California Department of Industrial Relations. The purpose of the letter was "to come to a global resolution" of issues raised by claims of former Denny's employees filed with the California Labor Commissioner. The attorney explained that Denny's policy requiring forfeiture of vacation wages when employees terminate prior to six months or one year of employment violated Cal. Labor Code §227.3. That statute provides that when "an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages" and further, "that an employment contract or employer policy shall not provide for forfeiture of vested vacation time upon termination." Appendix to Petition at 3a.

The letter further noted that the Department had concluded that "Denny's method of funding its vacation pay plan constituted a payroll practice and the plan is not therefore an ERISA plan which preempts state enforcement laws." The letter recounted prior discussions and litigation between the parties on this issue, including a state court's refusal to grant summary judgment to Denny's on its preemption defense. Given the numerous claims filed with the Department, the attorney proposed that Denny's meet with the Labor Commissioner and discuss an "amicable resolution: to avoid "the time and expense of litigation." Otherwise, the Department would have "to file an action against Denny's to finally resolve this issue." *Ibid.*

In response, on September 6, 2002, Petitioners herein (Denny's, Inc., the Plan, the Trust, and Andrew F. Green, as trustee of the Trust) filed a complaint for declaratory and injunctive relief in federal court in South Carolina against the California Labor Commissioner and Department of Industrial Relations (collectively, "Commissioner"). In this complaint, Petitioners sought: (1) a declaration that the Plan and Trust constitute an ERISA plan; (2) a declaration that "ERISA preempts the California statutes, regulations, and any action or decision" of the Commissioner "having the effect of law that [the Commissioner] seek[s] to enforce against [Petitioners] based upon California law"; and (3) "[p]reliminary and permanent injunctions barring [the Commissioner] from taking any action to enforce California law against [Petitioners] with regard to the Plan and the Trust." Appendix to Petition at 3a-4a. After filing their complaint in the federal district court, Petitioners failed to file any application for a temporary

restraining order or any motion for the issuance of a preliminary injunction. Appendix at 22-25.

On September 24, 2002, eighteen days after Petitioners filed their complaint in the district court, the Commissioner filed an action against Denny's in California state court, for damages and injunctive relief. Specifically, the state court action contends that Denny's violated Cal. Labor Code §227.3 by forfeiting employees' accrued vacation. The state court action seeks payment of the unlawfully forfeited vacation wages and "waiting time penalties" pursuant to Cal. Labor Code §203. The Commissioner also asked the state court to order Denny's to cease and desist from violating the Labor Code. The state court action does not name or seek any recovery from any ERISA plan, trust, or trustee. Appendix at 12-19. In its answer to the state court action, Denny's alleged ERISA preemption as an affirmative defense. Appendix to Petition at 4a.

After filing the state court action, the Commissioner moved to dismiss the federal action, contending that the federal district court in South Carolina lacked personal jurisdiction over the California officials. Alternatively, the Commissioner contended that the Anti-Injunction Act ("AIA"), 28 U.S.C. §2283, and abstention based on *Younger v. Harris,* 401 U.S. 37 (1971), compelled dismissal. On February 27, 2003, the district court granted the Commissioner's motion, concluding it lacked personal jurisdiction over the Commissioner. The district court therefore did not reach any of the other grounds argued by the Commissioner. *Denny's, Inc. v. Cake*, 247 F.Supp.2d 813 (D.S.C. 2003).

Petitioners timely appealed to the United States Court of Appeals for the Fourth Circuit. In its decision, the

Fourth Circuit held that although the district court erred in that it could exercise personal jurisdiction over the Commissioner under 29 U.S.C. §1132(e)(2), Petitioners' federal court action was nonetheless barred by the AIA. Appendix to Petition at 1a-24a. Thereafter, petitioners filed for certiorari.

Concurrently, on July 2, 2004, the United States Department of Labor ("DOL") issued an advisory opinion letter, requested by Denny's, regarding the issue of whether its vacation pay program constituted an ERISA plan. The DOL concluded, on the facts provided to it by Denny's, that Denny's Vacation Trust is not an employee welfare benefit plan within the meaning of ERISA section 3(1), but rather, is "a mere pass-through vehicle for the employer's payment of ordinary vacation wages." Appendix at 32.

REASONS FOR DENYING THE PETITION

I. THERE IS NO RELEVANT SPLIT IN THE CIRCUITS, AS UNDER THE FACTS OF THIS CASE, EVERY CIRCUIT WOULD CONCLUDE THAT THE ANTI-INJUNCTION ACT APPLIES, EITHER BECAUSE THE DISTRICT COURT HAD NOT ISSUED AN INJUNCTION PRIOR TO THE FILING OF THE STATE ACTION, OR BECAUSE PETITIONERS HAD NOT FILED A MOTION FOR AN INJUNCTION PRIOR TO THE FILING OF THE STATE ACTION

The Anti-Injunction Act ("AIA") generally prohibits the federal courts from interfering with proceedings in the state courts:

> A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. 28 U.S.C. §2283.

The enumerated "exceptions are narrow and are 'not [to] be enlarged by loose statutory construction.'" *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988), citing *Atlantic Coast Line R. Co. v. Locomotive Engineers*, 398 U.S. 281, 287 (1970), and *Amalgamated Clothing Workers v. Richman Brothers Co.*, 348 U.S. 511, 514 (1955). "[A]n injunction staying state proceedings is proper only if it falls within one of the statutory exceptions[.]" *Ibid.* "On its face, the [AIA] is an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions. . . . [A]ny injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions to §2283 if it is to be upheld." *Atlantic Coast Line, supra,* 398 U.S. at 286-287. "Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy." *Id.* at 296-297.

Of course, the AIA has been held inapplicable to federal injunctions issued prior to the institution of the state court action. *Dombrowski v. Pfister*, 380 U.S. 479, 484 n.2 (1965). This holding is founded upon the AIA's plain language, which prohibits "grant[ing] an injunction to stay proceedings in a state court." The AIA does not prohibit granting an injunction that enjoins the filing of a

threatened but not yet filed state court action, as in such a situation, there is no state "proceeding" that is stayed. Applying *Dombrowski* to the facts of this case, the AIA would not have prohibited the issuance of an injunction until Respondents filed the state court action on September 24, 2004.

Petitioners argued that even though no injunction issued prior to the filing of state court action, the fact that the federal case was filed prior to the filing of the state court action makes the AIA inapplicable. (Appendix to Petition, at 13-14a.) The Fourth Circuit rejected Petitioners' argument, and held that "the [AIA's] prohibition on enjoining state court proceedings applies to any such proceeding pending at the time the federal court *acts* on the request for injunctive relief, regardless of when the state court action was filed." (*Id.* at 17-18a.) Here, the fact that the district court hadn't acted on a request for injunctive relief prior to the filing of the state court action was not surprising, in that Petitioners had done nothing to require the district court to act on any such request. Petitioners filed no application for a temporary restraining order against the filing of state court proceedings, and no motion for an injunction. Thus, the gravamen of Petitioners' argument is that the mere filing of a federal complaint for injunctive relief is, in itself, sufficient to overcome the AIA as to any subsequently filed state court action. There is no conflict among the circuits on this issue. Not a single circuit has held that the date of filing a federal complaint for injunctive relief is determinative as to whether the applicability of the AIA as to a subsequently filed state court action.

Prior to the Fourth Circuit's decision below, three other circuits have held that the determination as to

whether the AIA applies to prohibit enjoining a subsequently filed state court action is based on the date the federal court issued the injunction. These three circuits hold that if the injunction was not issued prior to the filing of the state court action, the AIA applies, regardless of when the federal lawsuit was filed. *Roth v. Bank of the Commonwealth*, 583 F.2d 527, 533 (6th Cir. 1978), *cert. dismissed,* 442 U.S. 925 (1979); *Standard Microsystems Corp. v. Texas Instruments, Inc.*, 916 F.2d 58, 62 (2d Cir. 1990); *Royal Ins. Co. of Am. v. Quinn-L Capital Corp.*, 3 F.3d 877, 885 (5th Cir. 1993).

In contrast, three other circuits have held that the determination as to whether the AIA applies to prohibit enjoining a subsequently filed state court action is based on the date the federal plaintiff applied for a temporary restraining order or filed a motion for an injunction. *Barancik v. Investors Funding Corp.*, 489 F.2d 933, 937 (7th Cir. 1973); *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122, 1127 (8th Cir. 1982); *Hyde Park Partners, L.P. v. Connolly,* 839 F.2d 837, 842 n.6 (1st Cir. 1988) (dicta). Significantly, none of these cases can be read to support the proposition that the mere filing of a complaint in federal court is sufficient to make the AIA inapplicable to a subsequently filed state court action. For that reason, there is no conflict between the circuits as to whether, under the facts herein, Petitioners can overcome the AIA. Simply put, whether analyzing these facts under *Roth* or *Barancik,* the result is the same – the AIA prohibits the federal court from enjoining the California Labor Commissioner's state lawsuit.

The very first paragraph of *Barancik* announces that "[t]he question presented by this appeal is whether the [AIA] prohibits a federal court from staying proceedings in

a state court which were not commenced until after a motion to enjoin the institution of such proceedings was filed." *Barancik,* 489 F.2d at 934. Plaintiffs filed their motion for a preliminary injunction on July 27, 1972 – some three months after they had filed suit in federal court. While the motion for preliminary injunction was pending, seeking to bar defendants from commencing a separate legal action, defendants filed a separate action in state court. *Id.* at 934-935. The author of the *Barancik* decision, then-Judge Stevens, made clear the critical distinction between the filing of the federal lawsuit and the filing of the motion for injunctive relief: "The mere fact that the federal complaint was filed before the state proceeding was commenced is not sufficient to avoid the statutory bar. [citing *Kline v. Burke Construction Co.*, 260 U.S. 266 (1922), interpreting an earlier version of the AIA.] On the other hand, it is equally clear that since no state action was pending on July 27, 1972, when plaintiffs filed their motion, the statute would not have prevented the federal court from entering an injunction forthwith." *Barancik,* 489 F.2d at 936. The court ultimately concluded that the AIA's "applicability must be determined as of the time when the federal court's injunctive powers are invoked," which it defined as "the time the motion for an injunction is made." *Id.* at 937.

National City Lines is equally unhelpful to Petitioners, as it is apparent from the facts of that case that the federal plaintiff filed an application for a temporary restraining order contemporaneously with the filing of the federal lawsuit, on September 8, 1981. The very next day, a hearing was held before the district court judge, who deferred issuing a temporary restraining order after securing the parties' commitment to maintain the status

quo. Two days later, the defendant filed a state court action. *National City Lines, supra,* 687 F.2d at 1124. Based on these facts, the Eighth Circuit relied on *Barancik* to hold that the AIA did not bar the federal court from enjoining the state court action, as "the determinative date is September 8, 1981, the date on which National petitioned for injunctive relief in federal court." *Id.* at 1127-1128. Likewise, *Hyde Park Partners* also presents a case where the federal plaintiff filed a motion for a temporary restraining order at the same time it filed the federal lawsuit – 11:05 A.M. on December 21, 1987. The court scheduled a hearing on the motion for the next day, but at 4:45 P.M. on December 21, defendant filed a state court action. *Hyde Park Partners,* 839 F.2d at 840.

In short, there is not a single circuit court case that stands for the proposition that the mere filing of a federal lawsuit, without the filing of a motion for a temporary restraining order or preliminary injunction, is sufficient to overcome the AIA's prohibition against enjoining state court proceedings. Here, Petitioners' failure to invoke the district court's injunctive powers through the filing of a motion for a temporary restraining order or preliminary injunction is fatal to its claim for relief under both *Roth* and *Barancik.* The conflict between the circuits that have lined up behind these two cases notwithstanding, there is no conflict under the facts of this case. As this issue would be decided adversely to Petitioners by every circuit, this case does not present this Court with the opportunity to resolve those differences that do exist among the circuits.

II. UNDER THE CRITERIA ESTABLISHED BY THIS COURT, AS APPLIED BY VIRTUALLY EVERY CIRCUIT, THE AVAILABILITY OF A STATE FORUM TO RAISE AN ERISA PREEMPTION DEFENSE PRECLUDES APPLICATION OF THE "EXPRESSLY AUTHORIZED" EXCEPTION TO THE ANTI-INJUNCTION ACT

A. ERISA Is Not an "Expressly Authorized" Exception to the Anti-Injunction Act, As the Test Formulated in *Mitchum v. Foster* is Not Met Here, and Preemption is Insufficient to Create an "Expressly Authorized" Exception.

In *Mitchum v. Foster*, 407 U.S. 225, 237-238 (1972), this Court articulated the test used to determine whether a statute comes within the "expressly authorized" exception to the AIA. "In order to qualify as an 'expressly authorized' exception to the anti-injunction statute, an Act of Congress must have created a specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding," such that the Act in question "could be given its intended scope only by the stay of a state court proceeding." *Ibid.*, emphasis added. While it is axiomatic that ERISA created various federally protected rights, it simply was not enacted to create the type of uniquely federal right considered in *Mitchum*. There, this Court examined 42 U.S.C. §1983, whose "very purpose . . . was to interpose the federal courts between the States and the people, as guardians of the people's federal rights." *Id.* at 242. While ERISA may have been designed to unify the nation's law concerning employee welfare benefits, it was not enacted

out of some fear that "state courts were being used to harass and injure individuals." See *id.* at 240.

Petitioners must also overcome this Court's decision in *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 881 (1977) (plurality opinion). In *Vendo,* this Court elaborated on the *Mitchum* test, explaining that, "[b]y limiting the statutory exceptions of §2283 and its predecessors to these few instances, we have clearly recognized that the Act countenancing the federal injunction must necessarily interact with, or focus upon, a state judicial proceeding." 433 U.S. at 640-641. Because the Clayton Act did not "by its very essence contemplate or envision any necessary interaction with state judicial proceedings," it was held not to be an exception to the AIA. *Ibid.* Petitioners have made no showing, and indeed none can be made, that ERISA meets the criterion established in *Vendo.*

The mere fact that a federal statute may preempt state law is insufficient to place that federal statute within the "expressly authorized" exception to the AIA. This Court has rejected such an argument time and again, and has stated, "[A] federal court does not have inherent power to ignore the limitations of §2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear." *Atlantic Coast Line,* 398 U.S. at 294 (citing *Amalgamated Clothing Workers,* 348 U.S. at 519-520). Instead, "when a state proceeding presents a federal issue, even a preemption issue, the proper course is to seek resolution of that issue by the state court." *Chick Kam Choo,* 486 U.S. at 149-150. Thus, despite this Court's finding that an employer's state court action against a union was "outside state authority" and that jurisdiction

was vested solely in the National Labor Relations Board, this exclusive federal jurisdiction was not sufficient to render the AIA inapplicable. *Vendo,* 433 U.S. at 637 n.8 (describing this Court's decision in *Amalgamated Clothing Workers*).

Petitioners urge that those circuits that have held that ERISA does not provide an "expressly authorized" exception to the AIA "undermine[] ERISA's purposes" and "impair ERISA's mandate for national uniformity." (Petition at 10-11.) However, "the importance of the federal policy to be 'protected' by the injunction is not the focus of the inquiry." *Vendo,* 433 U.S. at 636. "[T]he prohibitions of §2283 exist separate and apart from these traditional principles [of equity and comity]. And [this Court] cannot read the 'intended scope' language as rendering [§2283] . . . inoperative simply because important federal policies are fostered by the statute under which the injunction is sought." *Id.* at 639.

B. The Allegedly Conflicting Decisions Among the Circuit Courts Concerning Whether ERISA is an "Expressly Authorized" Exception to the Anti-Injunction Act are Distinguishable on Their Facts.

In contrast to the Third, Fourth and Fifth Circuits, two circuits – the Second and Sixth – have decided that ERISA operates as exception to the AIA. Compare *General Motors Corp. v. Buha*, 623 F.2d 455 (6th Cir. 1980) [finding ERISA is an "expressly authorized" exception to AIA], and *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985) [same], with *Total Plan Services, Inc. v. Texas Retailers Ass'n, Inc.*, 925 F.2d 142 (5th Cir. 1991) [finding no ERISA exception, and affirming district court's denial of

injunctive relief], *United States Steel Corp. Plan for Employees Insurance Benefits v. Musisko*, 885 F.2d 1170 (3d Cir. 1989), *cert. denied,* 493 U.S. 1074 (1990) [holding that ERISA's language and its legislative history fail to demonstrate a congressional desire to defeat the bar of §2283, and reversing district court's order granting injunctive and declaratory relief], *1975 Salaried Retirement Plan for Eligible Employees of Crucible, Inc. v. Nobers*, 968 F.2d 401 (3d Cir. 1992), *cert. denied,* 506 U.S. 1086 (1993) [same rationale as *Musisko*, affirming district court's denial of injunction, thereby allowing laid-off employees to maintain state court action, despite the circuit court's certainty that state court action is preempted by ERISA], and *Employers Resource Management Co. v. Shannon*, 65 F.3d 1126 (4th Cir. 1995), *cert. denied,* 516 U.S. 1094 (1996) [holding that ERISA does not operate as an automatic exception to the AIA].

In its decision herein, the Fourth Circuit appears to have extended *Employers Resource Management* to all ERISA cases, adopting a categorical approach that ERISA can never operate as an exception to the AIA. (Appendix to Petition at 13a, n.9.) In her concurring opinion, Judge Williams observed that the result would be the same under the case-by-case approach that has been adopted by some of the other circuits, as there is nothing "in the text or legislative history of ERISA indicating that Congress intended to carve-out this type of case from the run-of-the mill ERISA case," so that under either test, "ERISA does not authorize the requested relief." *Ibid.* at 24a. Indeed, Petitioners assume too much when they argue that based on *Buha*, the Sixth Circuit would not have dismissed this

complaint under the AIA.[1] (Petition at 21.) In short, *Buha* is easily distinguishable, and "the 'circuit split' that allegedly exists . . . is far less troubling once the particular cases are examined." *Employers Resource Management,* 65 F.3d at 1132; see also *Musisko, supra,* 885 F.2d at 1178.

In *Buha*, the district court had enjoined a state court judge from enforcing a writ of attachment. The defendant, Buha, had previously obtained a state court judgment against Walter Kinsky in a tort action. Kinsky did not pay the judgment, and Buha instituted post-judgment garnishment procedures. A writ of garnishment was served on a bank that was serving as the trustee for a General Motors pension plan. The bank denied liability as a trustee of the pension fund, and Buha demanded an examination of the bank. General Motors filed an action in federal district court, requesting that the court restrain enforcement of the writ. *Buha*, 623 F.2d at 457. On appeal, the Sixth Circuit evaluated the propriety of the district court's decision to enjoin the state court proceedings. Its holding is nowhere near as sweeping as Petitioners now suggest. The Sixth Circuit held:

> When a district court finds that an action in a state court will have the effect of making it impossible for a fiduciary of a pension plan to carry out its responsibilities under ERISA, the anti-injunction provisions of §2283 do not

[1] Petitioners also assert that this issue would have been decided in its favor by the Second Circuit under *Gilbert*. But that Second Circuit decision can hardly be cited to support the notion that ERISA is an "expressly authorized" exception to the AIA. As other courts have observed, the *Gilbert* decision made this assertion in a conclusory manner, without any analysis. *Musisko*, 885 F.2d at 1178; *Employers Resource Management*, 65 F.3d at 1132-1133.

> prohibit it from enjoining the state court proceedings.

Id. at 459.

The dissimilarities between *Buha* and the instant case are striking. In *Buha*, the plaintiff was not even a party to the state court action, and thus, was unable to assert the defense of federal preemption in that proceeding. Here, Denny's, Inc. is a defendant in the lawsuit pending in the California state court, where it is able to assert (and, in fact, has already asserted) the defense of ERISA preemption in that proceeding. Appendix to Petition at 4a. In *Buha*, the federal court did find that the pending state court action could prevent the pension plan's trustee from carrying out its responsibilities under ERISA – namely, the responsibility to protect a beneficiary's pension funds from being used as a source of recovery in a tort action. Here, there has been no finding by the district or circuit courts (nor could there be any finding under the facts of this case) that the pending state action against Denny's, Inc. would make it impossible for an ERISA fiduciary to carry out its responsibilities under ERISA. There are a number of reasons why such a finding could not be made in this case.

First, the Labor Commissioner's state court action seeks recovery from Denny's – not from its purported ERISA plan or from any purported ERISA trust – for reimbursement of vacation wages unlawfully forfeited under California law. This is a far cry from *Buha*, where the enjoined state proceeding sought to garnish funds from an ERISA trust.

Second, as noted above, Denny's can assert (and has asserted) a preemption defense in the pending state action. Therefore, under *Mitchum*, Denny's cannot satisfy

the "expressly authorized" exception because it can obtain in the state court proceeding the exact remedy that it seeks from the federal court – i.e., a ruling that it provides vacation benefits to its employees through an ERISA plan, and that ERISA therefore preempts enforcement of California Labor Code §227.3. Again, this presents the opposite situation from *Buha*, where General Motors was not a party to the state court proceedings and therefore could not assert an ERISA preemption defense.

Finally, despite numerous and repeated assertions from Denny's that it maintains an ERISA plan to provide vacation benefits to its eligible employees, there has been no court finding that Denny's vacation pay program in fact constitutes an ERISA plan. Such a finding is required under *Buha*, as a necessary predicate to a court finding that the pending state action would make it impossible for the ERISA fiduciaries to carry out their responsibilities under ERISA. Not only has there not been any such court finding here, but the United States Department of Labor ("DOL") – the administrative agency charged with enforcing ERISA – has now made the exact opposite finding. In a DOL advisory opinion issued on July 2, 2004 at the request of Denny's, DOL concluded, relying on this Court's opinion in *Massachusetts v. Morash*, 490 U.S. 107 (1989), that Denny's Vacation Plan and Trust is not an employee welfare benefit plan within the meaning of ERISA but rather, is "a mere pass-through vehicle for the employer's payment of ordinary vacation wages." Appendix at 32.

This federal agency's application of the law to the facts (that were presented to it by Denny's, presumably in the light most favorable to Denny's), reflects "a body of experience and informed judgement to which courts and litigants may properly resort for guidance." *Yates v.*

Hendon, ___ U.S. ___, 124 S.Ct. 1330, 1339 (2004), citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). As such, the DOL's finding all but ends Denny's argument that the state court action should be enjoined under the "expressly authorized" exception to the AIA, as it presents a virtually insurmountable barrier to a court finding – required under *Buha* – that the pending state action will make it impossible for the ostensible ERISA fiduciaries to carry out their ostensible responsibilities under ERISA. And no matter how emphatically Petitioners have asserted that they will be unable to carry out their responsibilities under ERISA if the Labor Commissioner's state lawsuit goes forward, or if Denny's is subjected to California vacation law, these emphatic assertions are not a substitute for a court finding.

Thus, notwithstanding the differences in analysis between those circuits that take a categorical view that ERISA never comes within the "expressly authorized" exception to the AIA, and those circuits that take a case-by-case approach under which certain ERISA cases will come under the exception while others will not, the facts of this case compel the same result – inapplicability of the "expressly authorized" exception. Under closer analysis of the purported conflict, it becomes apparent that every circuit that has analyzed the question would conclude that Petitioners cannot meet the standard articulated in *Mitchum*, and as such, cannot overcome the AIA. This case therefore does not present an opportunity for this Court to clarify the standard to be followed under the "expressly authorized" exception.

III. DECLARATORY RELIEF IS ALSO BARRED BY THE ANTI-INJUNCTION ACT; OTHERWISE THE AIA WOULD SERVE NO FUNCTION AT ALL

In *Royal Ins. Co. of Am. v. Quinn-L Capital Corp.*, 3 F.3d at 884, the Fifth Circuit quoted its earlier en banc decision in *Texas Employers Ins. Ass'n v. Jackson*, 862 F.2d 491 (5th Cir. 1987) for the holding that a declaratory judgment issued by a district court is invalid where the AIA bars injunctive relief, because "[t]o allow declaratory relief in these circumstances would be to transform section 2283 from a pillar of federalism reflecting the fundamental constitutional independence of the states and their courts, to an anachronistic, minor technicality, easily avoided by mere nomenclature or procedural sleight of hand." *Id.* at 505. Here, the Fourth Circuit reached the same conclusion, stating "if the [AIA] bars the injunctions Denny's has sought, it also bars the declaratory relief it has sought." Appendix to Petition at 12a, n.8.

This was the precise rationale of this Court when it decided *Samuels v. Mackell*, 401 U.S. 66 (1971), a companion case to *Younger v. Harris*, 401 U.S. 37 (1971). Relying on its prior decision in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943) [a case arising under the Tax Injunction Act], this Court held that "the same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment, and that where an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well." *Samuels v. Mackell*, 401 U.S. at 73.

Petitioners assert that two federal circuit decisions have taken a more relaxed view of the propriety of

declaratory relief under circumstances where the AIA prohibits injunctive relief. Significantly, both of these decisions acknowledge that as a general rule, declaratory relief should not be available when the district court is prohibited from enjoining the state proceedings under the AIA. *Thiokol Chemical Corp. v. Burlington Industries, Inc.*, 448 F.2d 1328, 1332 (3d Cir. 1971); *Travelers Ins. Co. v. Louisiana Farm Bureau Federation, Inc.* 996 F.2d 774, 776 (5th Cir. 1993). However, these two cases stand for the proposition that there are "a very small class of highly distinguishable cases which are exceptions to the broad rule." *Id.* at 776. Petitioners' reliance on these two cases is misplaced, however, in that there is nothing about this case that would put it into this "very small class of highly distinguishable cases."

Thiokol would remove from the general rule certain state lawsuits which "are likely to turn on a question of federal law with which a federal court is likely to be more familiar and experienced than the state court." 448 F.2d at 1332. Whether or not the Labor Commissioner's state court action against Denny's is likely to turn on the defense of federal preemption, it cannot be said that federal courts are any more or less likely than state courts to be familiar and experienced with preemption issues – which by definition, only arise at the intersection of federal and state law. It is of course well established that there is no grant of exclusive jurisdiction to federal courts to resolve ERISA preemption questions when they are asserted defensively. See, e.g., *Fresh Int'l v. Agricultural Labor Relations Bd.*, 805 F.2d 1353, 1362 n.13 (9th Cir. 1986) ["We do not read section [1132] as foreclosing a state court from considering a defense based on ERISA preemption"]; see also *Catepillar, Inc. v. Williams*, 482 U.S. 386, 400

(1987) [federal defense in state court action will not deprive state courts of jurisdiction].

Travelers Insurance would remove from the general rule certain federal declaratory relief actions that are not brought to nullify the other party's advantage in state court, or to change forums, but rather, that are brought to avoid a multiplicity of suits in various forums. 996 F.2d at 776-777. Under the facts here, Petitioners' federal action does not come within any of the *Travelers Insurance* factors. Less than two months after the California Labor Commissioner proposed a "global resolution" of vacation claims or, absent such resolution, the "fil[ing] of an action against Denny's to finally resolve this issue," Denny's filed this lawsuit in a federal court 3,000 miles away from California. Appendix to Petition at 3a. It would be hard to imagine a more spectacular example of procedural gamesmanship, with the obvious purpose of disadvantaging the Labor Commissioner. Ironically, one of the allegations contained in Petitioners' complaint is that the Commissioner's enforcement of California vacation law against Denny's is precluded by a prior order of the district court for the Central District in California in *California Hospital Ass'n v. Henning,* 569 F.Supp. 1544 (C.D. Cal. 1983). Appendix at 10.

Thus, if this matter belongs in federal court at all, the Central District of California certainly would seem like the logical venue. But this action was filed not just to change forums (from state court to federal court) but primarily, to make it impractical for the Labor Commissioner to litigate at all by changing the forum venue from California to South Carolina. Whatever the merits of carving out any exceptions from the general rule that denies declaratory relief if the AIA precludes injunctive relief, one thing is

clear – the *Travelers Insurance* court would show no sympathy for Petitioners' claim: "Using a declaratory judgment to race to *res judicata* or to change forums is thoroughly inconsistent with the purposes of the Declaratory Judgment Act and should not be countenanced." *Travelers Insurance*, 996 F.2d at 777 n.7.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

DENNY'S, INC., in its fiduciary capacity as plan administrator; DENNY'S INC. VACATION PAY PLAN; ANDREW F. GREEN, in his capacity as trustee of the DENNY'S, INC. EMPLOYEE BENEFITS TRUST; and DENNY'S, INC. EMPLOYEE BENEFITS TRUST,	**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**
Plaintiffs,	**(Filed Sep. 6, 2002)**
v.	**Case No.: 7-02-2968-20**
CHUCK CAKE, in his capacity as Acting Director of the California Department of Industrial Relations and ARTHUR LUJAN, in his capacity as the Labor Commissioner of the State of California,	
Defendants.	

Plaintiffs, complaining of Defendants, state as follows:

1. This action seeks a declaration, pursuant to Rule 57 of the Federal Rules of Civil Procedure and 28 U.S.C. § 2201, *et seq.*, that the Denny's, Inc. Vacation Pay Plan (the "Plan") and the Denny's, Inc. Employee Benefits Trust (the "Trust"), established by Denny's, Inc.

("Denny's"), and administered and managed by Denny's and Andrew F. Green, in his capacity as a trustee of the Trust (the "Trustee", constitute an employee welfare benefit plan subject to Title I, Subtitles A and B of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1001, *et seq.*

2. Denny's does business and employs approximately 30,000 employees in 36 states, including California. Denny's maintains its principal place of business in Spartanburg, South Carolina. Denny's maintains the Plan and the Trust for the purpose of providing vacation benefits to its eligible employees. The Plan is an employee welfare benefit plan within the meaning of 29 U.S.C. § 1002(1). The Trust is a South Carolina Trust and is maintained pursuant to and as part of the Plan.

3. Denny's is the administrator of the Plan within the meaning of 29 U.S.C. § 1002(16)(A) and is a fiduciary of the Plan within the meaning of 29 U.S.C. § 1002(21). The Plan is administered by Denny's in South Carolina. The Trustee is a fiduciary of the Plan within the meaning of 29 U.S.C. § 1002(21). The Trust is administered and managed by the Trustee in South Carolina. The Plan and the Trust constitute an employee welfare benefit plan pursuant to 29 U.S.C. § 1002(1). The Trustee is a citizen and resident of South Carolina.

4. The California Department of Industrial Relations is a governmental agency created by the State of California in order to promote, protect, and improve the health, safety and economic well-being and improve the working conditions of employees working within the State of California and is based in Sacramento, California. The

California Department of Industrial Relations is responsible for promulgating state regulations related to California labor and employment law statutes and enforcing the labor and workplace safety and health laws of the State of California. Defendant Chuck Cake is the Acting Director of the California Department of Industrial Relations and directs the activities, agents, and employees of the California Department of Industrial Relations.

5. The California Division of Labor Standards Enforcement (the "DLSE") is a government agency of the State of California that falls within the jurisdiction of the California Department of Industrial Relations. The DLSE is responsible for, among other things: (1) adjudication of wage claims brought under the California Labor Code and other provisions of the laws of the State of California including, but not limited to, the regulations and wage orders promulgated by the California Department of Industrial Relations through its Industrial Welfare Commission, and (2) investigating and prosecuting complaints brought against California employers for potential violations of the California Labor Code and other provisions of the laws of the State of California including, but not limited [sic], the regulations and wage orders promulgated by the California Department of Industrial Relations through its industrial Welfare Commission. Defendant Arthur Lujan is the California Labor Commissioner and is the director and individual in charge of the DLSE. Defendant Arthur Lujan directs the activities of the DLSE. In addition, the DLSE staff, as well as its enforcement personnel are agents of Defendants Lujan and Cake and are subject to their control and direction.

6. This case arises under the Constitution and the laws of the United States of America. This case presents a

federal question within this Court's jurisdiction under Article III of the Constitution of the United States of America and 29 U.S.C. § 1331 and 29 U.S.C. § 1001, *et seq.*

7. This Court has authority to grant declaratory and injunctive relief as requested in this Complaint pursuant to 28 U.S.C. § 2201, *et seq.*, Rule 57 of the Federal Rules of Civil Procedure, and 29 U.S.C. § 1132(a)(3).

8. Venue is proper in this judicial district under 28 U.S.C. § 1391(b) and pursuant to 29 U.S.C. § 1132(e)(2).

9. The Plan provides vacation benefits under specified uniform terms to eligible employees of Denny's throughout the United States, including California employees. The Plan is funded through the Trust. The Trust is a separate trust and the assets of the Trust are separate from the assets of Denny's. The Trust is funded through regular and periodic contributions by Denny's. The Trustee is authorized to receive, hold, invest, and distribute the funds in the Trust pursuant to the terms of the Trust. Vacation benefits under the Plan are paid directly to eligible employees from the Trust pursuant to the terms of the Plan. The assets of the Trust are to be used solely for the purposes of paying vacation benefits under the Plan and paying the reasonable administrative expenses of the Plan and the Trust.

10. The Plan provides for the payment of vacation benefits under the terms set forth in the applicable summary plan descriptions of the Plan, which are incorporated into and made part of the Plan. The summary plan descriptions of the Plan are distributed to the eligible employees of Denny's. The summary plan descriptions of the Plan state that employees are entitled to certain rights and protections under ERISA. The Plan provides that the

terms of the Trust are incorporated into and made part of the Plan. The terms of the Trust provide that the Plan is an employee welfare benefit plan within the meaning of 29 U.S.C. § 1002(1) and that the Trust is intended to meet the requirements of ERISA. The Plan and the Trust have been operated in a manner consistent with Denny's intent that the Plan and the Trust are subject to ERISA.

11. One of the fundamental objectives of ERISA is to preclude state regulation of employee benefit plans so that multistate employers, such as Denny's, can provide uniform employee benefits throughout the United States. ERISA generally preempts "any and all State laws insofar as they may . . . relate to any employee benefit plan . . . ". 29 U.S.C. § 1144(a) The term "employee benefit plan" is defined under ERISA to include an "employee welfare benefit plan", which, in turn, is defined as "any plan, fund, or program . . . established or maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries . . . vacation benefits. . . . " 29 U.S.C. § 1002(1). The application of California (or other state law) to the Plan and the Trust could require that Denny's provide benefits under different terms in the various states in which it operates. In addition, the application of California law to the Plan and the Trust would require that Denny's and the Trustee operate the Plan and the Trust in a manner that is inconsistent with the terms of the Plan and the Trust and in violation of their fiduciary duties under ERISA.

12. In determining whether a vacation benefit plan and trust constitute an employee welfare benefit plan under ERISA, the United State [sic] Supreme Court has concluded that "[t]he creation of a separate fund to pay employees' vacation benefits would subject a single

employer to the regulatory provisions of ERISA." *Massachusetts v. Morash*, 490 U.S. 107, 114 (1989).

13. Over the last five years, a number of Denny's former California employees have filed claims with DLSE, seeking unpaid vacation wages and waiting time penalties pursuant to the California Labor Code and other provisions of California law. In many of these cases, Denny's has presented the DLSE with copies of the Plan and the Trust documents and the DLSE has subsequently dismissed the former employees' claims on the ground that the Plan and the Trust constitute an employee welfare benefit plan under ERISA and there is no claim under California law because of preemption of California law by ERISA. However, recently, the DLSE has taken a contradictory position and concluded that the Plan and the Trust do not constitute an employee welfare benefit plan under ERISA and that California law is applicable. The DLSE now takes the position that California law was violated by the actions of Denny's, as the Plan administrator, and by the payment of benefits in accordance with the terms of the Plan and the Trust, and that the former Denny's employees are entitled to monetary damages and penalties under California law.

14. On July 11, 2002, Denny's received a letter from Susan A. Dovi, Esquire, a staff attorney working on behalf of and at the direction of both Defendants, in which Ms. Dovi concluded that the Plan and the Trust do not constitute an employee welfare benefit plan under ERISA and that the operation of the Plan and the Trust violates § 227.3 of the California Labor Code and other provisions of California law. In her letter, Ms. Dovi indicated that the DLSE intends, at some unspecified date, to file a lawsuit seeking unpaid vacation benefits and penalties for all

former California employees of Denny's for a four-year period of time.

15. The Plan provides that a salaried employee cannot use vacation benefit days until he or she has completed six months of continuous service with Denny's. The Plan further provides that a salaried employee will not be paid any vacation benefits upon termination of his or her employment unless he or she has completed six months of continuous service. The Plan provides similar rules in the case of hourly employees during the first year of continuous service. The DLSE takes the position that, under California law, a Denny's California employee's accumulated vacation benefit days constitute deferred wages that vest and that such an employee's accumulated vacation benefit days cannot be forfeited as a result of termination of employment. The DLSE now asserts that the operation of the Plan and the Trust with respect to Denny's California employees violates California law because of the forfeiture of unused accumulated vacation benefit days and as referenced in Paragraph 14 above, has threatened to file an action against Denny's and the Trust for damages for alleged violations of California law. No such action has yet been filed.

16. The provisions of California law that Defendants seek to enforce conflict with the terms of the Plan and the Trust, and the enforcement of these provisions would require that Denny's and the Trustee violate their fiduciary duties under 29 U.S.C. § 1104(a)(1)(D) to operate and manage the Plan and the Trust in accordance with the terms of the Plan and the Trust. The California laws that Defendants seek to enforce are state laws that relate to the Plan and the Trust and are thus preempted pursuant to 29 U.S.C. § 1144(a). The Defendants' threatened enforcement

of said California laws and the Defendants' legal position as set forth in the aforementioned July 11, 2002 letter of Susan A. Dovi, Esquire would thus violate federal law and would be contrary to said preemption of state laws by ERISA.

17. The United States District Court, Central District of California previously issued a judgment against Patrick W. Henning, Labor Commissioner, Division of Labor Standards Enforcement, Department of Industrial Relations, State of California, in which the District Court held that the California laws that Defendants presently seek to enforce against Plaintiffs were preempted by ERISA insofar as such laws related to funded vacation plans and programs.

18. In this prior litigation, the District Court granted summary judgment, holding that the vacation plans and programs of employers engaged in interstate commerce constitute employee welfare benefit plans subject to ERISA and that California law was preempted insofar as such law purported to regulate such plans or programs. See *California Hospital Association v. Henning*, 569 F.Supp. 1544 (C.D. Cal. 1983). The District Court then issued a permanent injunction barring Defendants' predecessor Labor Commissioner Henning from taking action to enforce California law against unfunded and funded vacation plans and programs.

19. On appeal, the Ninth Circuit Court of Appeals reversed the District Court with respect to unfunded vacation plans and programs and remanded the case to the District Court for a determination of whether the application of ERISA to funded vacation plans and programs was an issue litigated below on which the plaintiffs

prevailed and, If so, whether attorneys' fees should be awarded.

20. On remand, the District Court in *Henning* concluded that the issue of the application of ERISA to funded vacation plans and programs was litigated and decided by the District Court in its original opinion and that plaintiffs had, in fact, prevailed on that issue. The District Court then modified its prior judgment, in part, as follows:

> (a) The plaintiffs' motion for summary judgment was granted, in part on the ground that funded vacation plans and programs maintained by employers engaged in interstate commerce are employee welfare benefit plans subject to ERISA and ERISA preempted California law as to funded vacation plans;
>
> (b) That DLSE lacked jurisdiction over vacation plans and programs which qualify as employee welfare benefit plans within the meaning of ERISA; and
>
> (c) The District Court dissolved the permanent injunction previously issued by the court "based on the representations by [Labor Commissioner Henning's] counsel that [Labor Commissioner Henning] does not intend to enforce state laws against, or assert jurisdiction over, funded vacation programs. . . . "

21. Contrary to Defendants' predecessor's prior representations to the District Court in *Henning* and in disregard of the order issued by the *Henning* court, Defendants now seek to enforce California state law against, and assert jurisdiction over the Plan and the Trust, which constitute a funded vacation plan.

22. Due to Defendants' threatened enforcement action against Plaintiffs as outlined above, and because said threatened actions are contrary to Defendants' predecessor's prior representations to the District Court in *Henning* and are in disregard of the order of the District Court in *Henning*, preliminary and permanent injunctions should be issued barring Defendants from taking any such threatened enforcement actions.

23. A declaration by this Court setting forth whether the Plan and the Trust constitute an employee welfare benefit plan under ERISA and whether Defendants are precluded by prior order of the District Court in *Henning* from attempting to enforce California law with regard to the Plan and the Trust: (1) is necessary to resolve the controversy between the parties, (2) would serve a useful purpose in clarifying the legal issues in dispute and allow the Plaintiffs to thus determine whether the Plan and the Trust are subject to California law, and (3) would serve the interest of judicial economy.

WHEREFORE, Plaintiffs pray for the following relief:

1. A declaration pursuant to Rule 57 of the Federal Rules of Civil Procedure, 28 U.S.C. § 2201, *et seq.*, and 29 U.S.C. § 1132(a)(3) that:

> (a) The Plan and the Trust constitute an employee welfare benefit plan under 29 U.S.C. § 1002(1) and are subject to Title I, Subtitles A and B of ERISA;
>
> (b) ERISA preempts the California statutes, regulations, and any action or decision of Defendants having the effect of law that Defendants seek to enforce against any of the Plaintiffs based upon California law; and

(c) Defendants are precluded by prior order of the United States District Court in *Henning* from attempting to enforce California law with regard to the Plan and the Trust and from contending that ERISA does not preempt any such action on Defendants' part;

2. Preliminary and permanent injunctions barring Defendants from taking any action to enforce California law against Plaintiffs with regard to the Plan and the Trust;

3. Plaintiffs' attorneys' fees and costs in this matter; and

4. Such other and further relief as this Court deems just and proper.

HOLCOMBE, BOMAR, GUNN
AND BRADFORD, P.A.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA, NORTHERN DIVISION
(UNLIMITED JURISDICTION)

ARTHUR S. LUJAN, STATE LABOR COMMISSIONER, DIVISION OF LABOR STANDARDS ENFORCEMENT, DEPARTMENT OF INDUSTRIAL RELATIONS, STATE OF CALIFORNIA, Plaintiff, vs. ADVANTICA RESTAURANT GROUP, INC., a Delaware corporation; DENNY'S CORPORATION, a Delaware corporation formerly known as ADVANTICA RESTAURANT GROUP; DENNY'S, INC., a California corporation; EL POLLO LOCO, INC., a California corporation; and DOES 1-10, inclusive, Defendants.	Case No.: 2002065951 COMPLAINT FOR UNPAID WAGES; PENALTIES; INJUNCTIVE RELIEF [No fee per Labor Code section 101, et seq.] (Filed Sep. 24, 2002)

Plaintiff, DIVISION OF LABOR STANDARDS ENFORCEMENT, Department of Industrial Relations, State of California, by and through ARTHUR S. LUJAN, the State Labor Commissioner, complains of Defendants, and each of them, and alleges as follows:

FIRST CAUSE OF ACTION

(Unpaid Wages – Against All Defendants)

1. Plaintiff, ARTHUR S. LUJAN, the Labor Commissioner of State of California and the Chief of the DIVISION OF THE LABOR STANDARDS ENFORCEMENT (hereinafter the "DIVISION" or the "LABOR COMMISSIONER"), a division of the Department of Industrial Relations, State of California, is authorized to bring this action pursuant to Labor Code sections 95(a), 96.7, 98.3, 217, 1194.5, and 1195.5

2. At all times herein mentioned, Defendants, ADVANTICA RESTAURANT GROUP, INC., a Delaware corporation, DENNY'S CORPORATION, a Delaware corporation formerly known as ADVANTICA RESTAURANT GROUP, INC., were and are corporations doing business in the County of Alameda in the State of California, and have owned and operated various restaurants throughout California, including the County of Alameda.

3. At all times herein mentioned, Defendant DENNY'S, INC., a California corporation, has been a wholly owned subsidiary of defendants ADVANTICA RESTAURANYT [sic] GROUP, INC., and DENNY'S CORPORATION, and has operated restaurants known as "Denny's" throughout California, including the County of Alameda. These defendants entered into contracts with

employees to perform work in Alameda County, which provided for vacation benefits as described in paragraph 8, hereinbelow, and for forfeiture of vacation time in violation of California law as described in paragraph 9, hereinbelow.

4. At all times herein mentioned, defendant EL POLLO LOCO, INC., a California corporation, has been a wholly owned subsidiary of defendants ADVANTICA RESTAUARANT [sic] GROUP, INC., and DENNY'S CORPORATION, and has operated restaurants throughout California known as "El Pollo Loco".

5. Plaintiff is ignorant of the true names and capacities of DOES 1 Through 10, inclusive, and for that reason sues said defendants by such fictitious names. Leave of court will be requested to amend this complaint to show their true names and capacities when they have been ascertained.

6. California Labor Code sections 201, 202, 227.3, 2926, and 2927, require the full and complete payment of all wages earned but not yet paid, including all accrued vacation wages, either immediately (in the event of discharge) or within 72 hours (in the event of a quit) upon termination of the employment relationship. Labor Code §227.3 expressly prohibits the forfeiture of vested vacation time upon termination, and requires the payment of such vested vacation time as wages at the employee's final rate of pay. The California Supreme Court, in *Saustez v. Plastic Dress-Up Co.* (1982) 31 Cal.3d 774, held that vacation vests as it is earned, and that it constitutes a form of deferred wages which cannot be forfeited upon termination.

7. At all times relevant herein, Defendants, and each of them, have owned and/or operated restaurants, have employed workers in the furtherance of their restaurant businesses, and have been subject to the above-referenced provisions of the California Labor Code.

8. At all times relevant herein, Defendants, and each of them, have employed workers pursuant to a written vacation pay policy which provides that: (a) eligible employees begin earning vacation upon hire, (b) during the first six months of employment for salaried management employees or during the first year of employment for hourly paid employees, the employee may not use any of his or her earned vacation hours, and (c) if the salaried management employee terminates or is terminated prior to having completed six months of employment, or if the hourly paid employee terminates or is terminated prior to having completed one year of employment, then no payout for unused vacation hours will occur, and the earned vacation time will be forfeited. A copy of Defendants' vacation pay plan is attached hereto as Exhibit "A".

9. The above-described written vacation pay policy is unlawful in that it violates Labor Code sections 201, 202, 227.3, 2926, and 2927. At all times relevant herein, Defendants, and each of them, pursuant to their unlawful vacation pay policy, have forfeited vested vacation wages of salaried management employees who separated from employment prior to completing six months of service with defendants, and have forfeited vested vacation wages of hourly paid employees who separated from employment prior to completing one year of service with defendants.

10. Defendants and the Division have entered into a tolling agreement effective July 15, 2002, tolling the

statute of limitations on any action that might be filed by the Labor Commissioner with regard to defendants' written vacation pay policy.

11. At all times relevant herein, Defendants, and each of them, have failed and refused, and continue to fail and refuse, to pay any of the wages owed to its employees whose vested vacation wages were unlawfully forfeited pursuant to defendants' vacation pay policy.

12. As a result of defendants' violation of the above-cited provisions of the California Labor Code, workers employed by defendants have been injured through the unlawful forfeiture of vested vacation wages. Defendants' employees who separated from employment on or after July 15, 1998 are entitled to payment of these unlawfully forfeited vested vacation wages, with the exact amount of such unpaid wages (in excess of the jurisdictional limit of limited jurisdiction courts) to be ascertained at or before trial.

SECOND CAUSE OF ACTION

(Penalties, Labor Code §203 – Against All Defendants)

As a separate and distinct cause of action, Plaintiff complains of Defendants and each of them, and alleges as follows:

13. Plaintiff incorporates herein each and every allegation contained in Paragraphs 1 Through 12, inclusive, of the First Cause of Action as though fully set forth herein.

14. Defendants' failure or refusal to pay their terminated employees their vested vacation at their final rates

of pay within the time required by Labor Code sections 201 or 202 was "willful" within the meaning of Labor Code section 203, in that defendants had a legal obligation to pay such wages promptly upon termination of employment and intentionally failed to do so.

15. As a result of defendants' willful failure to pay the vested vacation wages to employees who separated from employment on or after July 15, 1998, each such employee is entitled to payment of waiting time penalties pursuant to Labor Code §203, in an amount equal to thirty days of each employee's daily wages, with the exact amount (in excess of the jurisdictional limit for limited jurisdiction courts) to be ascertained at or before trial.

THIRD CAUSE OF ACTION

(Injunctive Relief – Against All Defendants)

As a separate and distinct cause of action, Plaintiff complains of defendants and each of them and alleges as follows:

16. Plaintiff incorporates herein each and every allegation contained in Paragraphs 1 through 12, inclusive, of the First Cause of Action and Paragraphs 13 through 15, inclusive, of the Second Cause of Action, as though fully set forth herein.

17. By doing the acts complained of hereinabove, Defendants, and each of them, have willfully violated the provisions of California Labor Code sections 201, 202, and 227.3. Defendants have failed and refused, and continue to fail and refuse, to comply with said provisions, and unless directed by this Court to cease and desist from violating said provisions, and to comply with said provisions,

Defendants will continue to violate and fail to comply with said provisions.

WHEREFORE, plaintiff prays for judgment against defendants, and each of them, as follows:

AS AND FOR THE FIRST CAUSE OF ACTION:

1. For unpaid vacation wages according to proof;
2. For pre-judgment interest on all unpaid vacation wages, pursuant to Labor Code section 218.6;
3. For costs;
4. For any other relief the Court deems just and proper.

AS AND FOR THE SECOND CAUSE OF ACTION:

1. For waiting time penalties pursuant to Labor Code section 203 according to proof;
2. For costs;
3. For any other relief the Court deems just and proper.

AS AND FOR THE THIRD CAUSE OF ACTION:

1. For an order and judgment directing and requiring Defendants, their agents, officers, and assigns, to cease and desist from violating Labor Code sections 201, 202 and 227.3, and to comply with all provisions of the California Labor Code regarding the payment of vested vacation wages to employees promptly upon termination of employment;
2. For costs;
3. For any other relief the Court deems just and proper.

Dated: 9/22/02

DIVISION OF LABOR
STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California

By: /s/ [Signature]
SUSAN A. DOVI
Attorney for the Labor
Commissioner

(N.B. When the State is plaintiff, complaint need not be verified, but that the answer thereto must be verified. C.C.P. section 446.)

U.S. District Court
Web PACER (v2.4)
Docket Report

[Docket as of April 14, 2003, 8:30 p.m.]

U.S. District Court

District of South Carolina (Spartanburg)

CIVIL DOCKET FOR CASE #: 02-CV-2968

Denny's Inc, et al v. Cake, et al

Filed: 09/06/02
Assigned to: Judge Henry M. Herlong, Jr
Demand: $0,000
Nature of Suit: 791
Lead Docket: None
Jurisdiction: Federal Question
Dkt# in other court: None
Cause: 29:1132 E.R.I.S.A.-Employee Benefits

DENNY'S INC, in its fiduciary capacity as plan administrator plaintiff	Perry D Boulier 864-585-3844 [COR LD NTC] Holcombe Bomar Gunn and Bradford PO Box 1897 Spartanburg, SC 29304 864-585-4273
DENNY'S INC VACATION PAY PLAN plaintiff	Perry D Boulier (See above) [COR LD NTC]
ANDREW F GREEN, in his capacity as trustee of the Denny's Inc Employee Benefits Trust plaintiff	Perry D Boulier (See above) [COR LD NTC]

DENNY'S INC EMPLOYEE BENEFITS TRUST plaintiff	Perry D Boulier (See above) [COR LD NTC]
v.	
CHUCK CAKE, in his capacity as Acting Director of the California Department of Industrial Relations defendant	Wendy Bergfeldt Cartledge 803-896-4471 [COR LD NTC] Geoffrey Ross Bonham 803-896-4471 [COR LD NTC] South Carolina Department of Labor Licensing and Regulation PO Box 11329 Columbia, SC 29211-1329 803-896-4470 Anne Hipshman Miles E Locker Susan A Dovi Department of Industrial Relations State of California Division of Labor Standards Enforcement 455 Golden Gate Avenue 9th Floor San Francisco, CA 94102 415-703-4863
ARTHUR LUJAN, in his capacity as the Labor Commissioner of the State of California defendant	Wendy Bergfeldt Cartledge (See above) [COR LD NTC] Geoffrey Ross Bonham (See above) [COR LD NTC]

Anne Hipshman
(See above)
Miles E Locker
(See above)
Susan A Dovi
(See above)

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
9/6/02	1	COMPLAINT for Declaratory and Injunctive Relief; FILING FEE $ 150.00 RECEIPT # 600 13990 Scheduling order due by 12/16/02 Service due by 1/4/03 for Arthur Lujan, for Chuck Cake (awil) [Entry date 09/09/02]
9/6/02	2	SUMMONS(ES) issued for defendant Chuck Cake, defendant Arthur Lujan (awil) [Entry date 09/09/02]
9/6/02	3	ANSWER to Local Rule 26 Interrogatories by plaintiff Denny's Inc, plaintiff Denny's Inc Vacation, plaintiff Andrew F Green, plaintiff Denny's Inc Employee (awil) [Entry date 09/09/02]
9/25/02	4	AFFIDAVIT OF SERVICE of summons and complaint executed as to defendant Chuck Cake 9/16/02 Assignment Interrogatories due on 10/16/02 for Chuck Cake; Answer due on 10/7/02 for Chuck Cake executed by personal service (awil)
9/25/02	5	AFFIDAVIT OF SERVICE of summons and complaint executed as to defendant Arthur Lujan 9/16/02 Assignment Interrogatories

		due on 10/16/02 for Arthur Lujan; Answer due on 10/7/02 for Arthur Lujan executed by personal service (awil)
9/26/02	6	MOTION by defendant Chuck Cake, defendant Arthur Lujan for Anne Hipshman, Miles Locker, and Susan Dovi to appear pro hac vice FILING FEE AMOUNT $225.00 Receipt # 3006134 (lcos) [Entry date 09/27/02]
9/26/02	7	AFFIDAVIT of Susan A. Dovi by defendant Chuck Cake, defendant Arthur Lujan Re: [6-1] motion for Anne Hipshman, Miles Locker, and Susan Dovi to appear pro hac vice FILING FEE AMOUNT $225.00 Receipt # 3006134 (lcos) [Entry date 09/27/02]
9/26/02	8	AFFIDAVIT of Miles E. Locker by defendant Chuck Cake, defendant Arthur Lujan Re: [6-1] motion for Anne Hipshman, Miles Locker, and Susan Dovi to appear pro hac vice FILING FEE AMOUNT $225.00 Receipt # 3006134 (lcos) [Entry date 09/27/02]
9/26/02	9	AFFIDAVIT of Anne Hipshman by defendant Chuck Cake, defendant Arthur Lujan Re: [6-1] motion for Anne Hipshman, Miles Locker, and Susan Dovi to appear pro hac vice FILING FEE AMOUNT $225.00 Receipt # 3006134 (lcos) [Entry date 09/27/02]
10/4/02	10	MOTION by defendant Chuck Cake to dismiss (jout) [Entry date 10/07/02]
10/4/02	11	MEMORANDUM by defendant Chuck Cake in support of [10-1] motion to dismiss with appendix of out of region authorities attached (jout) [Entry date 10/07/02]
10/4/02	12	NOTICE of request for judicial notice filed in support of their motion to dismiss by

		defendant Chuck Cake (jout) [Entry date 10/07/02]
10/9/02	13	MOTION by plaintiff Denny's Inc, plaintiff Denny's Inc Vacation, plaintiff Andrew F Green, plaintiff Denny's Inc Employee to extend time (awil) [Entry date 10/10/02]
10/9/02	14	AFFIDAVIT of Perry D. Boulier by plaintiff Denny's Inc, plaintiff Denny's Inc Vacation, plaintiff Andrew F Green, plaintiff Denny's Inc Employee Re: [13-1] motion to extend time (awil) [Entry date 10/10/02]
10/11/02	15	ORDER granting [13-1] motion to extend time (signed by Judge Henry M. Herlong Jr; EOD October 11, 2002, SVD (awil)
10/18/02	16	ORDER granting [6-1] motion for Anne Hipshman, Miles Locker, and Susan Dovi to appear pro hac vice FILING FEE AMOUNT $225.00 Receipt # 3006134 (signed by Judge Henry M. Herlong Jr; EOD October 21, 2002, SVD (awil) [Entry date 10/21/02]
11/4/02	17	RESPONSE IN OPPOSITION by plaintiff Denny's Inc, plaintiff Denny's Inc Vacation, plaintiff Andrew F Green, plaintiff Denny's Inc Employee to [10-1] motion to dismiss (awil) [Entry date 11/05/02]
11/12/02	18	REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS by defendant Chuck Cake, defendant Arthur Lujan to [17-1] motion response (ljon) [Entry date 11/13/02]
11/12/02	19	SUPPLEMENTAL REQUEST/MOTION by defendant Chuck Cake, defendant Arthur Lujan for judicial notice filed in support of their motion to dismiss (ljon) [Entry date 11/13/02]

1/16/03	20	LETTER of Wendy B. Cartledge Re: (ajac) [Entry date 01/17/03]
2/27/03	21	ORDER granting [10-1] defendants' motion to dismiss for lack of personal jurisdiction (signed by Judge Henry M. Herlong Jr; eod February 27, 2003, svd (awil)
2/27/03	–	Case closed (awil)
3/18/03	22	NOTICE OF APPEAL by plaintiff Denny's Inc, plaintiff Denny's Inc Vacation, plaintiff Andrew F Green, plaintiff Denny's Inc Employee Re: [21-1] order Fee Status: paid Receipt # 600 14980 (jsmi)
3/18/03	–	Notice of appeal and certified copy of docket to USCA: [22-1] appeal by Denny's Inc Employee, Andrew F Green, Denny's Inc Vacation, Denny's Inc (jsmi)
3/27/03	–	NOTICE of Docketing ROA from USCA Re: [22-1] appeal by Denny's Inc Employee, Andrew F Green, Denny's Inc Vacation, Denny's Inc USCA NUMBER: 03-1326 CASE MGR: Joy Hargett (jsmi)
3/27/03	23	Certificate that the Record on Appeal is Complete for [22-1] appeal by Denny's Inc Employee, Andrew F Green, Denny's Inc Vacation, Denny's Inc (jsmi)

[LOGO] **U.S. Department of Labor**
Employee Benefits
Security Administration
www.dol.gov/ebsa

Advisory Opinion

July 2, 2004

2004-08A
ERISA Sec. 3(1)

Mr. Barry V. Frederick
Wiggins Childs Quinn & Pantazis
301 19th Street North
Birmingham, AL 35203

Dear Mr. Frederick:

This is in response to your request on behalf of Denny's, Inc. for an advisory opinion regarding the applicability of Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA). Specifically, you asked whether the Denny's, Inc. Vacation Pay Plan (Plan) is an "employee welfare benefit plan" within the meaning of section 3(1) of ERISA.

You provided the following facts and representations in support of your request. The Plan was established to provide paid vacation benefits to eligible employees of Denny's, Inc. and certain affiliates (Denny's). Eligible full and part-time employees earn vacation hours under the Plan based on average hours worked, length of service, and level of employment. The maximum accrual is 6.67 hours per month for hourly employees and 13.3 hours per month for salaried employees. Hourly employees may carry up to 80 vacation hours over from year-to-year and salaried employees can carry up to 1 year of vacation time. Participants must submit a request to the Plan prior to

taking vacation in order to receive vacation pay from the Plan. Upon termination, whether voluntary or involuntary, salaried employees with six or more months of continuous service and hourly employees with 1 year of continuous service are paid their accumulated but unused vacation pay balance. You indicated that few employees carry vacation pay balances because of Denny's rate of employee turnover.

Denny's established the Denny's Inc. Employee Benefit Trust (Trust) to fund the Plan. The Trust is intended to be a tax-exempt voluntary employees' beneficiary association (VEBA) under section 501(c)(9) of the Internal Revenue Code. The Trust document provides that, "[t]he Trust shall be held and maintained for the exclusive benefit of the [e]mployees," and that, "[n]o part of the net earnings of the Trust shall inure (other than as Benefit payments) to the benefit of the [e]mployer or any individual." Denny's retains the right to amend or terminate the Plan at any time, but no amendment or termination can permit reversion of any part of the Trust to Denny's. The Trust document states that, "[t]he net income and profits of the Trust Fund shall be accumulated, added to the principal of the Trust Fund, and invested and reinvested therewith as a single fund by the Trustee." You represent, however, that the Trust assets are held in a non-interest bearing account because the Plan determined that the expenses associated with investing the assets would exceed the investment return.

Pursuant to section 2.5 of the Trust document, the trustee is entitled to receive contributions from Denny's in "such sums as from time to time are established by the Administrator." Section 2.5 further provides that, "[t]o the extent applicable or necessary, the Administrator shall base its

determination of these sums on actuarial principles, relying in good faith upon the recommendations of a qualified consultant or actuary as to the proper rate of contribution per Participant." You represent that the administrator has not obtained the recommendation of a consultant or actuary as to a contribution rate or established contribution requirements for Denny's. The trustee is empowered under the Trust documents to sue Denny's to collect unpaid employer contributions, but you indicated that, in the absence of any contribution requirements being set by the Administrator, the trustee would have to wait until the Trust was obligated to distribute bi-weekly vacation pay checks to sue Denny's for the amounts it needed to make those payments. Denny's, however, has voluntarily made sufficient contributions to the Trust to maintain a constant minimum account balance of at least $250,000.

You represent that the Plan distributes vacation pay by checks from a non-interest bearing bank account Denny's opened in its capacity as plan administrator. The bank account is designated the "Denny's Inc. Employee Vacation Trust Account" (Trust Account). Denny's determines the amount of vacation benefits to be paid in each two-week period, and generally deposits that amount into the Trust Account usually the day before the amount is paid out by the Trust in the form of vacation pay checks. The Trust Account issues vacation pay checks on the same bi-weekly schedule as Denny's normal payroll and the vacation pay checks include general payroll information from Denny's such as total wages paid and total year-to-date deductions for income taxes. The Plan covers approximately 32,000 participants, and pays approximately $8 million in benefits each year. The amount passed through the Trust

Account in a typical week equals or exceeds the $250,000 balance that Denny's maintains in the Trust.

Section 3(1) of Title I of ERISA defines the term "employee welfare benefit plan" to include: [A]ny plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

In regulation 29 C.F.R. § 2510.3-1, the Department of Labor clarified the definition of "employee welfare benefit plan" by describing certain arrangements that would not constitute employee welfare benefit plans within the meaning of section 3(1) of ERISA. Section 2510.3-1(b) of the regulation describes certain exempt payroll practices, and specifically provides that an employer program of compensating employees for vacation benefits out of the employer's general assets is not a welfare plan covered under Title I of ERISA. In the preamble of the regulation, the Department stated that "[s]ection 2510.3-1(b) distinguishes welfare plans from employer payroll practices which, although related to benefits described in [section 3(1) of ERISA], are more closely associated with normal wages or salary. . . ." If vacation benefits are paid from a

source other than the general assets of the employer, the conditions of the safe-harbor regulation are not met. In the Department's view, assets held in a separate trust with terms such as those described above in the Plan's VEBA Trust document do not constitute general assets of the employer for purposes of the Department's regulation at 29 C.F.R. § 2510.3-1(b). Accordingly, the Plan would not be an exempt payroll practice under that regulation.

Vacation pay programs that fail to satisfy all of the conditions of the regulation, however, are not necessarily covered by Title I of ERISA. Rather, such programs are subject to further evaluation under section 3(1) of ERISA to determine whether the program includes the requisite elements to constitute an ERISA employee benefit plan. In that regard, the Supreme Court in Massachusetts v. Morash, 490 U.S. 107 (1989), explained that "[t]he reference to vacation payments in § 3(1) should be understood to include within the scope of ERISA those vacation benefit funds, analogous to other welfare benefits, in which either the employee's right to a benefit is contingent upon some future occurrence or the employee bears a risk different from his ordinary employment risk." Id. at 116. The Court also noted that extensive state regulation of vesting, funding and participation rights of vacation benefits may afford more protection for vacation benefits than ERISA, and indicated a reluctance to cause their preemption in situations where not clearly indicated. Id. at 119. Although the Morash court observed that "the creation of a separate fund to pay employees vacation benefits would subject a single employer to the regulatory provisions of ERISA[,]" id. at 114, the discussion in Morash suggests that the mere presence of a trust or other separate account from which vacation benefits are paid should not automatically result in ERISA coverage in the absence

of the trust providing genuine protections to the accrued benefits under the plan or otherwise presenting risks ERISA was intended to address.[1]

Accordingly, in the Department's view, to determine whether the use of a trust or other separate account to pay vacation benefits in a vacation pay program such as Denny's should result in the program being treated as an "employee benefit plan" subject to Title I of ERISA, the program should be evaluated to determine whether the trust is a bona fide separate fund, whether the trust has the direct legal obligation to pay benefits under the plan, whether there is a contribution obligation enforceable against the employer, and whether contributions are actuarially determined, established through collective bargaining, or otherwise bear a relationship to the plan's accruing liability.[2]

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[1] For example, in emphasizing that the Morash decision concerned vacation benefits paid by a single employer out of its general assets, the court observed that: "An entirely different situation would be presented if a separate fund had been created by a group of employers to guarantee the payment of vacation benefits to laborers who regulatory [sic] shift their jobs from one employer to another. Employees who are beneficiaries of such a trust face far different risks and have far greater need for the reporting and disclosure requirements that the federal law imposes than those whose vacation benefits come from the same fund from which they receive their paychecks." Morash, 490 U.S. at 120. See also Alaska Airlines, Inc. v. Oregon Bureau of Labor, 122 F.3d 812 (9th Cir. 1997) (use of an "advance and recapture" trust in a single employer program did not convert sick leave program into an ERISA covered plan); Czechowski v. Tandy Corp., 731 F. Supp. 406 (N.D. Cal. 1990).

[2] This letter should not be read as expressing any view on whether an ERISA covered plan providing other welfare benefits through a pass-through trust would be treated as holding plan assets. See Advisory Opinion 92-24A (Nov. 6, 1992) and Advisory Opinion 99-08A (May 20, 1999).

In light of the above and based on the information submitted, the Department is unable to conclude that the Plan is an employee welfare benefit plan within the meaning of ERISA section 3(1). In this case, it appears that there is a separate trust with a direct legal obligation to pay the benefits due under the Plan. However, contributions do not appear to bear any relationship to the Plan's accruing liability and the administrator has not exercised its power under the Trust document to establish a rate of contribution per participant based on actuarial principles. The fact that the Trust documents may be read to impose a legal obligation on Denny's to contribute amounts every two weeks sufficient to pay vacation wages as they become due, and the fact that Denny's may voluntarily maintain a minimum balance of $250,000 in the Trust does not, in the Department's view, operate to change the essential nature of the Trust as a mere pass-through vehicle for the employer's payment of ordinary vacation wages or result in the Trust constituting a separate fund that provides genuine protections for the approximately $8 million in benefits that accrue under the plan each year.

This letter constitutes an advisory opinion under ERISA Procedure 76-1, and is issued subject to the provisions of that procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,
John J. Canary
Chief, Division of Coverage,
Reporting, and Disclosure
Office of Regulations and Interpretations